IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-524

FRED G. MORITT,

Appellant

v.

THE GOVERNOR OF THE STATE OF NEW YORK, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK and THE SECRETARY OF THE STATE OF NEW YORK,

Respondents,

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the New York State Court of Appeals is not yet reported officially, but is set forth in the Appendix, infra. pp A-1 to A-9

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of §136(5) of the Election Law of New York State infra, p 3 , on the ground that it is repugnant to the Constitution of the United States.

Appellant instituted a special proceeding (Art 78 New York Civil Practice Law and Rules) against the Respondents in New York State Supreme Court, Kings County, to have §131(2) and §136(5) of the New York State Election Law declared unconstitutional under both the Federal and State Constitutions and to have the Respondent Governor convene the Legislature for the purpose of enacting election laws not repugnant to these Constitutions. The State Supreme Court on December 13, 1974 ruled that these statutes were indeed unconstitutional under the equal protection clause of the Fourteenth Amendment of the United States Constitution and under Article 6 of the Constitution of the State of New York. An appeal was taken to the Appellate Division, Second Department, of the New York State Supreme Court by the Respondents. On July 6, 1976, the Appellate Division unanimously reversed the decision of the lower court, finding the statutes constitutional. Appellant appealed the reversal to the New York State Court of Appeals which, on July 7, 1977, affirmed the order of the Appellate Division, (one Judge dissenting) and found the statutes to be constitutional. Timely notice of appeal to this Court was filed in the Supreme Court of New York, Kings County. Since the Court of Appeals of New York State explicitly rejected appellant's challenge to §136(5) of the Election Law, this matter is appropriately brought to this Court by appeal. See e.g. Schroeder v. City of New York, 371 U.S. 208(1962). Election Law §131(2) is not the subject of this appeal.

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103. See e.g. Cousins v. Wigoda, 419 U.S. 477(1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves New York Election Law §136(5) (McKinney 1971) which states:

> Petitions for any office to be filled by the voters of the entire state must be signed by not less than twenty thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state, of whom no less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state.

QUESTIONS PRESENTED

Whether Election Law §136(5), which prevents a candidate for his party's nomination to statewide office from having his name placed on the primary ballot unless he obtains twenty thousand signatures of enrolled voters of the party on a nominating petition, one hundred of which signatures must be from each of one half of the congressional districts of the state, violates the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT

Appellant has held elective public office in New York State for over 37 years, serving in the State Assembly, the State Senate and as an elected Judge in the City of New York. In 1972 he declared himself a candidate for the Democratic Party nomination for Judge of the New York Court of Appeals. However, he did not receive the endorsement of the Democratic State Committee nor did he receive at

least 25% of the votes cast at the committee meeting, Election Law §131(2)(b)(1)(2)(3). As a result, he could not compete in the primary election held June 20, 1972 without obtaining the petitions specified in Election Law §§ 131(2)(c)(d) and 136(5), which require the signatures of 20,000 or 5% (whichever is less) of the duly enrolled Democrats, of whom 100 or 5% (whichever is less) must live in each of one-half of the State's Congressional districts, id. §136(5). In seeking to comply with the petition requirements the Appellant found them (1) to impose an onerous time consuming burden upon himself and other potential candidates not designated at the state committee meeting, (2) to discriminate against Democrats in Congressional districts having a heavy Democratic registration, and (3) to make it financially prohibitive for one not receiving 25% of the vote of the state committee to run in the state wide primary. In addition, he believed that §131(2)(a) was an unlawful delegation to the state committee of the power to make nominations to statewide offices and a violation of the state Constitution.

In order to remedy this situation the Petitioner instituted an action in the United States District Court for the Southern District of New York to have New York Election Law §§ 131(2) and 136(5) declared unconstitutional as violative of the New York State Constitution(Article VI) and the United States Constitution (Article IV §§ 2, 4 and Amendments I, IX, and XIV). He further requested the federal Court to permit any candidate who filed a petition containing the signatures of any 12,000 enrolled Democrats, to run in the primary for state-wide office.

On June 12, 1972, the District Court dismissed the complaint, Moritt v. Rockefeller, 346 F. Supp. 34 (S.D.N.Y. 1972). Three separate opinions were filed.

Judge McLean held that Appellant lacked standing to challenge Election Law §136(5) since he had failed to file any designating petitions, 346 F.Supp. at 37. Appellant's claim regarding §131 was rejected as not presenting a substantial constitutional question. However, Judge McLean would have astained on this issue since Petitioner had raised questions of state law that conceivably might be dispositive, 346 F.Supp. at 38.

Judge Feinberg agreed with Judge McLean that Petitioner lacked standing to raise the issue of the constitutionality of §136(5) and that the federal claims regarding §131 were insubtantial. Since only state law questions remained, he declared that he would not exercise pendent jurisdiction to consider them, 346 F.Supp. at 39.

Judge Tenney agreed that the §131 federal claims were insubstantial and should be dismissed. However, while agreeing that petitioner's failure to file at least 12,000 signatures, as he himself had prescribed, would be fatal to the §136(5) claim if it had been couched solely as a claim of an unreasonable burden upon a candidate, his view was that as a voter, appellant could challenge the distributive requirements of that statute, supra at 39. Accordingly, Judge Tenney found those requirements to be unconstitutional as infringing upon the one-man, one-vote principle, 346 F.Supp. at 39-41.

Petitioner appealed to the United States Supreme Court, but this court summarily affirmed the judgment of the three-judge District Court without oral argument, one justice dissenting, 409 U.S. 1020(1972).

During the Spring of 1974, Appellant was a candidate for the Democratic Party nomination for

Attorney General of the State of New York. Since he was not placed on the primary ballot by the State Committee pursuant to Election Law §131, Appellant's candidacy was barred unless he could meet the petition requirements of §136(5) of the Election Law. Still believing this provision to be unconstitutional, Appellant brought an action in New York State Supreme Court, under Art 78 of the New York Civil Practice Law and Rules, to have the statute declared unconstitutional. The court treated the action as one for a declaratory judgment and on December 13, 1974 ruled the statute unconstitutional. Enforcement of the court's order was stayed pending an appeal to the Appellate Division of the New York State Supreme Court, Second Department. The Appellate Division on July 6, 1975 reversed the Supreme Court, Kings County, and found the statute constitutional. 53 App. Div. 2d 857, 385 N.Y.S. 2d 584(1976). On appeal the New York State Court of Appeals on July 7, 1977, affirmed the decision of the Appellate Division (one Judge dissenting).

In its decision the New York State Court of Appeals conceded that §136(5) violates the one man-one vote principle. The Court stated

> It can be acknowledged that, because the number of enrolled party members does and probably always will vary widely from one Congressional District to another, the strict application of the one man-one vote principal announced by the Supreme Court will strike down the criteria of subdivision (5) of section 136.

However, the Court held that the State's interest in assuring that a candidate has statewide support before his name is placed on the ballot outweighed the burden placed on the candidate by this statute. Since the Appellant disagrees with this conclusion, this appeal is being brought.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question was raised by instituting a special proceeding under Art 78 of the New York State Civil Practice Law and Rules to have Election Law §136(5) declared unconstitutional, which action was treated as a request for declaratory judgment. The N.Y. State Supreme Court, Kings County, found the statute unconstitutional. This judgment was reversed by the Appellate Division of the N.Y. Supreme Court, Second Department, whose decision was affirmed by the New York Court of Appeals.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Election Law §136(5) as construed by New York's highest court allows the votes or petition signatures of voters in some parts of the State to be diluted with respect to those voters in other parts of the State. This works to the detriment of both those voters and the candidates they support, and raises serious questions with respect to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

THE DISTRIBUTED SIGNATURE REQUIREMENT OF SECTION 136(5) VIOLATES THE ONE MAN-ONE VOTE PRINCIPLE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

While a state may act to limit the number of candidates placed on a ballot, it may not do so in such a way as to violate the Constitution. Socialist Workers Party v Rockefeller, 314 F.Supp. 984 (S.D.N.Y.) aff'd 400 U.S. 806(1970). Under the equal protection clause of the United State Constitution, "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote...wherever their home may be in that geographical unit." Gray v. Sanders, 373 U.S. 368,379(1973). This principle of "one-man one vote" has been extended beyond its early application to the apportionment of state legislatures to state-created activities of political parties engaged in the process of nominating candidates for public office by primaries and conventions. Moore v. Ogilivie, 394 U.S. 814 (1969); Seergy v. Kings County Republican County Committee, 459 F.2d 308 (2nd) Cir. 1972); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971); Irish v. Democratic - Farmer - Labor Party, 399 F.2d 119 (8th Cir. 1968); Maxey v. Washington State Democratic Committee, 319 F.Supp. 673 (W.D. Wash. 1970); Smith v. State Executive Committee of the Democratic Party, 288 F.Supp. 371 (N.D. Ga. 1968); 39 BROOKLYN L. REVIEW, 907, 1000 (1973).

Because of §131(2)(c)(d) of the New York Election Law, §136(5) requires a person seeking to have his name placed on the ballot in a party primary to obtain 20,000 signatures of the then enrolled voters of the party in the state, of whom

not less than 100 reside in each of one-half of the Congressional districts of the state. The five percent provisions in the statute never come into effect because the 20,000 and 100 figures are always less than five percent. Under the statute only party members may sign petitions to have a candidate's name placed on the primary ballot. Franco v. Board of Elections of Nassau County, 64 Misc. 2d 19 (Sup. Ct. Nassau Co. 1970). While Congressional districts have nearly equal populations, they do not have equal numbers of registered members of one of the major political parties. As a result the votes of party members i.e. their signatures on a petition, in a district in which the party has only a few members will be given much more weight than the votes or signatures of party members in districts where party registration is high. Such a situation is unconstitutional and goes beyond the State's power to set reasonable standards for placing a person's name on the ballot. Section 138(5)(a) of the Election Law was a related predecessor statute that required the signatures of "at least twelve thousand voters, of whom at least fifty shall reside in each county of the state" for a candidate to have his name placed on the general election ballot. In Socialist Workers Party v. Rockefeller, supra, the distributed signature requirement of this statute was held unconstitutional because there were unequal numbers of voters in each county and, hence the signatures of people in the less populated counties were given greater weight than the signatures of people in the more populous counties.

Prior to the enactment of §136(5) a nominating petition to place a candidate's name on the primary election ballot required the signatures of 5% of the enrolled party members without any maximum and without the distributed voting requirement here challenged. However, in 1967, the

primary petition law was changed to set a maximum of 10,000 signatures, but a distributed signature requirement calling for 50 signatures from each of three-quarters of the counties of the state was added. L.1967, c. 716, §4. In the Socialist Workers Party case §138(5)(a) which was similar to the primary petition section, but applied to the general election, was declared unconstitutional. As a response to this the primary petition statute was modified so that the governmental unit was changed from the county to the Congressional district, which districts have nearly equal numbers of voters, and the distributed signature requirement was changed to 100 voters in each of one-half of the Congressional districts. L.1971, c. 428, §1. However, this statute is also unconstitutional in that the voters permitted to sign a petition are only the "then enrolled voters of the party in the state." Since the enrolled voters of a particular party are not the same in all Congressional districts, the distributed signature requirement gives the voters in the districts with low party enrollment more power in determining whose name is placed on the primary ballot then the voters in districts where party registration is high. Appendix page B-1 gives a breakdown of party registration in the New York City vicinity. This shows a more than 2 to 1 ratio of Democrat registration between the 13th and 17th Congressional Districts. Hence, each registered Democrat in the 17th District has twice as much influence in the petition process as each Democrat in the 13th District. As a result the present statute's distributive signature requirement is invalid based on reasoning similar to that in Socialist Workers Party v. Rockefeller, supra. In fact the New York Court of Appeals in this case conceded the point when it stated that "because the number of enrolled party members does and probably always will vary widely from one

Congressional District to another, the strict application of the one man-one vote principle announced by the Supreme Court would strike down the criteria of subdivision(5) of section 136." Appendix page A-2.

In order to uphold this statute the Court of Appeals found that New York State had a legitimate interest in requiring a candidate to show statewide support before placing his name on the primary ballot and that this interest outweighed the rights of the voters and candidates who were denied equal protection of the laws. In support of this position the Court of Appeals cited Williams v. Rhodes, 393 U.S. 23, 34 (1968) and Jenness v. Fortson, 403 U.S. 431, 442 (1971). However, it is submitted that these cases are no authority for the Court of Appeals decision. In the Williams and Jenness cases minor parties or candidates were trying to get their names on the general election ballot. The present case involves a candidate attempting to get his name on a primary ballot, the results of which would determine if he has statewide support. In addition the court in the Williams case found that the State of Ohio had no "compelling interest" based on the remote possibility that the ballot would become crowded, which would justify the burden imposed on the election process, supra. at 31-33. Equally New York State in the present case cannot justify this law on the remote possibility that "party members in one area of the state may, solely for petition purposes, exercise exclusive control over the nominating process." Appendix page A-2.
In fact, eliminating the distributed signature requirement of §136(5) would have the opposite effect in that it would provide greater access to the election process by all groups and would break the almost monopoly power of the State Committee in determining the names placed on the

primary ballot. This Court in the Jenness decision recognized that the State had an "important interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot," but did not provide that any geographic support was required, 403 U.S. at 442. In fact a requirement for geographic weighing of votes was found to be unconstitutional in Grey v. Sanders, were this Court stated

> How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. Supra. at 379

Therefore, New York State has no legitimate interest in requiring a candidate to show that he has statewide support before he can be placed on the primary ballot.

The Court of Appeals also supported the restrictions of §136(5) on the grounds that the gathering of the 2,000 signatures required under

the distributed signature requirement did not impose an onerous burden on a candidate. However, the time and expense required to travel to half of the Congressional districts in the State in the brief period during which petitions can be circulated certainly cannot be dismissed so cavalierly, especially to justify a requirement that serves no legitimate purpose. An attempt was also made to justify §136(5) by stating that a precise one man-one vote rule in party nominating procedures is not necessary. While Appellant agrees that mathematical precision is not necessary, a two to one difference in strength cannot be called de minimis. Connor v. Finch, 97 S. Ct. 1828 (1977). Also, the party nominating procedures certainly are not immune from the United States Constitution. Moore v. Ogilvie, 394 U.S. 814, 818-19 (1969).

Even if §136(5) were modified so as to base the distributed signature requirement on party enrollment in the Congressional district it would still be unconstitutional because it places a burden on the election process and is not necessary to protect any compelling state interest. Kramer v. Union Free School District, 395 U.S. 621, 626-27. (1969). Since state-wide offices are filled by a vote of the entire population without concern for the Congressional district from which the vote comes, the state's interest in the distribution of votes in a nominating petition is nonexistent.

II.

THE 20,000 SIGNATURE REQUIREMENT OF SECTION 136(5) IS AN UNNECESSARY BURDEN ON THE ELECTION PROCESS

Besides changing the governmental unit and the voters eligible to sign a petition, the Legislature in enacting §136(5) also changed the total number of signatures needed form 10,000 to 20,000. Although

the state has a legitimate interest "in requiring a preliminary showing of a sufficient modimum of support before printing the name of a political organization's candidate on the ballot, "Jenness v. Fortson, 403 U.S. 431, 442, (1971), the method by which it chooses to accomplish this must be necessary to protect the state's compelling interest. Storer v. Brown, 415 U.S. 724, 736 (1974). See also American Party of Texas v. White, 415 U.S. 767, 780-781; Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Lendall v. Jernigan, U.S. L.W. 2350 (E.D. Ark, Jan. 4, 1977).

The Lendall case stands for the proposition that a law requiring a candidate to obtain a large number of petition signatures in order to get on a ballot is unconstitutional unless the state can show that no lesser burden on the candidate will protect the State's interests. The Lendall court stated that where fundamental constitutional rights are burdened by legislation, that legislation may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest. The onus of demonstrating that no less intensive means will adequately protect the compelling interest is on the party seeking to justify the burden, i.e. the State. New York State required only 10,000 signatures from 1918 until 1971 and since there is no showing by the respondents that this lesser burden was ineffective to protect any legitimate interest of the State, this part of §136(5) of the N.Y. Election Law cannot be constitutional. Any arguments using an increase in the State's population as a justification for the increased number of signatures is irrelevant absent a showing that the lesser burden was insufficient.

CONCLUSION

For the foregoing Reasons, Probable Jurisdiction Should Be Noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

Melvin C. Garner
Attorney for Appellant

APPENDIX A

NEW YORK STATE COURT OF APPEALS

Case No. 354

FRED G. MORITT

Appellant,

v.

GOVERNOR, &c., &ors, &c.,

Respondents

MEMORANDUM

July 7, 1977

The order of the Appellate Division is affirmed, without costs. We conclude that New York State may constitutionally require a showing of statewide support in addition to a showing of numerical support so long as no substantial burden is imposed on access to the primary ballot (Williams v. Rhodes, 393 US 23, 34). The United States Supreme Court has recognized that there is an important state interest "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot ***" (Jenness v. Fortson, 403 US 431, 442). The states may therefore fix reasonable standards to assure that a candidate has some level of popular support. Section 136(5) of the Election Law does not impose an unconstitutionally onerous burden on a Democratic Party Candidate, such as petitioner, seeking to

place his name on a primary ballot. There are 39 Congressional districts in New York State and the statute requires only that a candidate have 100 signatures from each of one-half of those Congressional districts. Thus, 2000 of the required 20,000 signatures must be distributed geographically among 20 Congressional Districts and the remaining 18,000 may come from one district or any combination of districts. We do not think that this requirement is the type of restriction on access to the ballot which is invidiously discriminatory and violative of the Equal Protection Clause (see Williams v. Rhodes, supra.).

On the other hand, the geographical distribution requirement serves to preclude a concentration of party members in one area of the state that may, solely for petition purposes, exercise exclusive control over the nominating process. The challenged statute is thus a permissable method of preventing manipulation of the ballot by superficial petition signing. The statute guarantees that those seeking statewide office have some minimal measure of broad based numerical and geographical support and imposes no excessively prohibitive burden on a candidate seeking a position on a primary ballot. In light of the rationally based legitimate state purpose served by Section 136(5), it is inappropriate to conclude, as does the dissenter, that the distribution requirement is "irrelevant". It can be acknowledged that, because the number of enrolled party members does and probably always will vary widely from one Congressional District to another, the strict application of the one man-one vote principle announced by the Supreme Court would strike down the criteria of subdivision (5) of Section 136. The arithmetic application appears to be present. The Supreme Court, however, has said that the one man-one vote equation is not mechanically

or automatically to be applied at all levels of government or to every aspect of the electoral process. As indicated above, strong and sound reasons of electoral polity support the exaction of a broad geographical representation. Because this is so, and because of the near practical impossibility of implementing a precise one man-one vote rule in party nominating procedures, we do not think the Supreme Court would strike down the considered enactment of our State Legislature in §136(5). In our analysis full respect for the articulation of the Supreme Court rule to date does not require us to do so.

Thus, we find that the present version of the statute does not suffer from the infirmity of the former version of section 136(5) invalidated in Socialist Workers Party v Rockefeller (314 Supp 985, aff'd 400 US 906) since, unlike counties, the State's Congressional Districts all have nearly equal populations. While, as noted, there are differences in the numbers of registered Democrats among the various districts, because of shifting registration patterns the present version of the statute is probably the most feasible means of implementing a legitimate state policy and at the same time accommodating the mandate of the one man-one vote principle as articulated by the Supreme Court (compare, Moore v. Ogilvie, 394 US 804; Socialist Workers Party v Rockefeller, supra). For example, absolute precision in adherence to an infallible one man-one vote principle would make it necessary to allocate a separate district system for each political party and within the political party for each election year.

Our consideration of appellant's challenge to the constitutionality of section 131(2) of the Election Law under the Federal constitution is, of course, precluded by reason of the res judicata

effect we must accord the unanimous determination of the three-judge Federal court that the claim did not present a "substantial constitutional question" (Moritt v Rockefeller, 346 F Supp 34, affd 409 US 1020). On the merits, however, we find no merit to his claim and hold that section 131(2) of the Election Law does not violate the one man-one vote principle, or the provisions of the New York State Constitution relied upon by petitioner.

FUCHSBERG, J.: (dissenting):

Petitioner, Fred G. Moritt, claims his two unsucessful candidacies for nomination for statewide office were stymied by unconstitutional provisions of New York's Election law. His attack centers on section 131 (subd. 2) and 136 (subd. 5).

The first of these sections, 131 (subd. 2), allows each member of a political party's state committee "to cast a number of votes which shall be in accordance with the ratio which the number of votes cast for the party candidate for governor on the line . . . of the party at the last preceding general state election . . . bears to the total vote cast on such line . . . in the entire state"; a candidate for nomination who receives 25% or more of the vote of the state committee is automatically placed on the primary ballot. The second section, 136 (subd. 5), requires a candidate who does not receive such a percentage to obtain petitions signed "by not less than twenty thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state, of whom no less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state".

In 1972, petitioner declared his candidacy for the Democratic Party nomination for Associate Judge of the Court of Appeals. He was unable to obtain 25% of the vote of the State Democratic Committee. Thereupon, he commenced an action in Federal court seeking to declare the statutes unconstitutional. The majority of the three-judge court dismissed the action, soley on the grounds of abstention (Moritt v. Rockefeller, 346 F.

Supp. 34) and the United States Supreme Court summarily affirmed without opinion (409 U.S. 1020).

During the spring of 1974, petitioner again sought the Democratic Party nomination, this time for Attorney General. Again unsuccessful in obtaining 25% of the vote of the State Democratic Committee, he commenced this action in Supreme Court, Kings County, where he obtained a judgment declaring sections 131 (subd. 2) and 136 (subd. 5) unconstitutional. The Appellate Division unanimously reversed and the appeal is now here as of right.

Before consideration of the merits, we note that neither res judicata (based on the United States Supreme Court's summary affirmance) nor mootness preclude a determination on the merits. As to res judicata, the Federal court did not enter a judgment of constitutionality, but abstained; it therefore did not necessarily pass upon the issues sought to be litigated here (see Newin Corp. v. Hartford Acc. & Indemn. Co., 37 NY 2d 211, 216). Nor is the Supreme Court's determination, which "is an affirmance of the judgment only", entitled to any greater respect (Mandel v. Bradley, ___ U.S.___, 45 U.S.L.W. 4701). As to mootness, since a challenge to these provisions of the Election Law is likely to reoccur and yet, as a result of time limitations, evade review, the case should not be considered moot (Matter of Carr v. Bd. of Elections, 40 NY 2d 556, 559; cf. Oliver v. Postel, 30 NY 2d 171, 177).

On the merits, I find petitioner's attack on Election Law §136 (subd. 5) to be persuasive and would modify the order of the Appellate Division to declare that portion of the statute which requires

signatures to be obtained from "no less than one hundred or five per centum, whichever is less, of such enrolled voters ... resid[ing] in each of one-half of the congessional districts of the state" to be unconstitutional.

A state may, of course, limit the number of candidates to be placed on the ballot (e.g. Jenness v. Fortson, 403 U.S. 431, 442). But the reason for denying access must rest upon some rational distintion. Obviously, the requirement for 20,000 signatures furthers a legitimate state interest that candidates demonstrate sufficient support to lessen the possibility of a plethora of quixotic candidates which could cause "confusion, deception and even frustration of the democratic process at the general election" (Jenness v. Fortson, supra, p. 442). And the gross numerical requirement in this case comports with those in other statutes which have resisted attack on that score (see American Party v. White, 415 U.S. 767, 782-83 [1% of the vote for governor in the last general election which amounted to 22,000 signatures]; cf. Storer v. Brown, 415 U.S. 724, 738, [5% of total vote cast in last general election]).

The geographical requirement is another thing. It does not further a legitimate state interest. It is now axiomatic that "one man-one vote" equal protection standards mandate that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit" (Gray v. Sanders, 372 U.S. 368, 379). This principle, first applied to the apportionment of a state legislature, has since been extended to activites

of political parties engaged in the process of nominating candidates for public office by either the primary or convention method (see e.g., Seergy v. Kings County Republican County Committee, 459 F2d 308; Bode v. National Democratic Party, 454 F2d 1302; cf. Moore v. Ogilvie, 394 U.S. 814).

Thus, statewide elective office must be filled by a vote of the entire State population. Its distribution by locality is irrelevant. Otherwise, as under section 136 (subd. 5) of our Election Law, a minority of enrolled party members could wield a veto power over the choice made by a majority (see Moritt v. Rockefeller, 346 F. Supp. 34, 41 [Tenney, J., dissenting in part], affd. 409 U.S. 1020, supra]). For, if the geographical distribution of signers of designating petitions under section 136 (subd. 5) are not in accordance with the figures or percentage arbitrarily fixed by that statute, a candidate will not be placed on the primary ballot even if he obtains the signatures of a majority of the enrolled members of the party in the State as a whole. Such a consequence, to borrow the majority's terminology, can hardly be termed "mechanical". It is a substantive matter of the first rank.

Another glaring example of the way in which Section 136(subd. 5) operates to place an unequal burden on statewide candidates arises out of the geographical concentration of the Congressional districts in New York State. As the majority indicates, Congressional district lines are drawn, as required by constitutional mandate, so as to make the districts nearly equal in population. Because of the heavily concentrated New York City metropolitan area population, 24 of the State's

39 Congressional districts are located in one small corner of the State. Candidates from that area may, therefore, travel between any two points to reach voters within the required twenty districts by public transportation within an hour; candidates from the western, nothern and central parts of the State are hundreds of miles and hours and hours away from the same availability of electors. (See map annexed).

However, no such infringement is found in the "weighted-voting" provisions of Election Law §131 (subd. 2). That statute simply provides for a voice in the nominating process equal to the party's voting strength in the particular area and "does not inhibit entry into the political arena, deny the right to vote or debase the weight of some votes" (New York State Democratic Party v. Lomenzo, 460 F 2d 250, 251). Indeed there is nothing unconstitutional per se in weighted voting (see Franklin v. Krause, 32 NY 2d 234 [semble], which serves to render the party nominating system manageable despite constantly shifting party enrollments.

Accordingly, the order of the Appellate Division should be modified to the extent of declaring the geographical distribution requirement set forth in Election Law §136 (subd. 5) unconstitutional and otherwise affirmed.

APPENDIX TO FOOTNOTE 1

Congressional Districts Within New York City

Congressional District	Total Reg. Demo.	5% Total [1] Reg. Demo.	Total Reg. Repub.	5% Total [1] Reg. Repub.	Total Reg. Lib.	5% Total [1] Reg. Lib.	Total Reg. Cons.	5% Total [1] Reg. Cons.	Total Reg. Voters
7	129,826	6,491	32,886	1,644	5,620	281	2,814	141	187,71[illegible]
8	144,932	7,247	37,639	1,882	5,769	288	4,075	204	212,267
9	110,725	5,936	57,131	2,857	3,373	169	7,286 [10]	364	201,267
10	124,537	6,227	42,253	2,113	3,983	149	5,609	280	190,20[illegible]
11	133,035	6,652	27,422	1,371	5,038	252	4,001	200	182,10[illegible]
12	79,960	3,998	10,740	537	3,718	186	567	28 [2]	103,56[illegible]
13	169,087 [4]	8,454	28,093	1,405	6,639	332	3,004	150	221,30[illegible]
14	79,935	3,997	18,505	925	3,100	155	1,637	82 [2]	111,92[illegible]
15	111,992	5,600	44,814	2,241	3,485	174	4,772	239	177,30[illegible]
16	147,710	7,386	26,979	1,349	5,930	297	3,259	163	197,39[illegible]
17	68,547 [3]	3,428	32,912	1,646	1,999 [7]	100	5,589	279	183,54[illegible]
18	121,486	6,074	62,910 [6]	3,146	7,695 [8]	385	2,413 [9]	121	224,93[illegible]
19	134,763	6,738	20,074	1,004	5,713	286	904	45 [2]	176,47[illegible]
20	132,400	6,620	25,532	1,277	7,008	350	1,841	92 [2]	206,23[illegible]
21	75,403	3,774	8,934 [5]	447	2,932	147	567	28 [2]	95,30[illegible]
22	151,718	7,586	23,997	1,200	6,946	347	3,353	168	203,23[illegible]

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IN THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

FRED G. MORITT, Appellant, - against - THE GOVERNOR OF THE STATE OF NEW YORK, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AND THE SECRETARY OF THE STATE OF NEW YORK, Respondents.	Kings County Clerk's Index No. 9171/74 Court of Appeals Clerk's File No. 600

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that FRED G. MORITT, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the New York State Court of Appeals affirming the order of the Appellate Division, Second Department uphold the constitutionality of Election Law §§131(2) and 136(5) entered in this action on July 7, 1977.

This appeal is taken pursuant to 28 U.S.C. §1267(2).

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Asst. Attorney Gen. State of New York
of Counsel

Anthony H. Durso
Clerk, Kings County Supreme Court
Supreme Court Building
Brooklyn, New York 11201

Certificate of Service

It is hereby certified that a copy of a Notice of Appeal to The Supreme Court of the United States was mailed on the 24th day of September, 1977, to Robert F. Hammer, Respondent's attorney of record, at Two World Trade Center, New York, New York 10047.

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